United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1345

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P/S

United States Court of Appeals

For the Second Circuit

Index No. 68 Civ. 2049 (CMM)

LA FORTUNE, Substituted for JONES & MCKNIGHT, INC.,

Plaintiff-Appellant,

—against—

S.S. IRISH LARCH, her engines, etc., IRISH SHIPPING, LTD., CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.

Defendants,

—and—

IRISH SHIPPING, LTD.,

Defendant and Third-Party Plaintiff-Appellee,

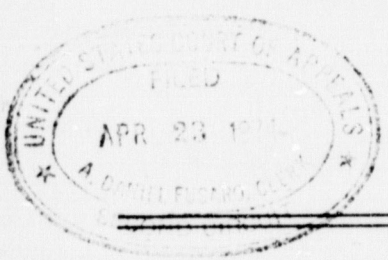
—against—

CHR. SALVESEN & CO., LTD., INTERNATIONAL GREAT LAKES TERMINAL CO., and TRANSOCEANIC TERMINAL CORP.,

Third Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT LA FORTUNE



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Jurisdiction

The decision of the United States District Court for the Southern District of New York was entered on December 27th, 1973 (9a, 10a, 11a)*. Final judgment was entered

*References are to the appendix to the brief for appellant, La Fortune.

on January 8th, 1974. Appellant, La Fortune, filed a Notice of Appeal on February 5th, 1974 (12a, 13a). The record on appeal was transmitted to the United States Court of Appeals for the Second Circuit on March 14th, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

Statement

This is an appeal by the plaintiff, La Fortune, underwriters subrogated to the rights of the owners of the shipment in suit, from a final judgment dated January 8th, 1974, entered in an admiralty suit for cargo damage in the Southern District of New York (Metzner, J.), dismissing plaintiff's complaint against the defendant vessel owner, Irish Shipping Ltd. La Fortune noticed its appeal from this judgment on February 5th, 1974.

Facts

On May 9th, 1967, a shipment of 283 unwrapped and wrapped coils of wire was received on board the SS Irish Larch, at Antwerp for transportation and carriage to Chicago. Clean Bill of Lading number 6 was issued by or on behalf of the vessel's master therefor, without exceptions as to the condition of the cargo (Plaintiff's Exhibit 2; 143a). The vessel was owned by defendant, Irish Shipping Ltd. (Defendant's Amended Answer, paragraph 4; 18a, 19a), and plaintiff, La Fortune, were underwriters subrogated to the rights of the owner of the shipment (Plaintiff's Exhibit 3; 145a; Plaintiff's Exhibit 4; 147a).

The SS Irish Larch arrived at Chicago on or about May 30th, 1967, berthed at the Transoceanic Terminal and commenced discharged operations (Plaintiff's Exhibit 6; 151a). When the cargo was to be delivered to the consignee, it was found that of the 283 coils shipped, 131 coils were bent, dirty, unbanded and tangled to the extent that they were

without commercial value and a total loss in the amount of $8,222.34 (134a; Plaintiff's Exhibit 5; 149a).

Issues Presented For Review

The questions presented by this appeal are whether the District Court erred in holding that:

1. The shipper knowingly misstated the nature and value of the shipment and the damage to the shipment therefor falls within the "excepted" causes of the Carriage of Goods by Sea Act of 1936, Title 46 U.S.C. § 1304.

2. Where a shipper knowingly misstates the nature and value of the shipment and no more, that damage to such shipment falls within the "excepted" causes of the Carriage of Goods by Sea Act.

3. The defendant proved that the cargo was insufficiently packaged and, damage to such cargo therefor falls within the "excepted" causes of the Carriage of Goods by Sea Act.

Applicable Law

The United States Carriage of Goods by Sea Act (COGSA), Title 46 U.S.C. § 1300 *et seq.*, provides, in part, as follows:

> "§ 1300. Bills of lading subject to chapter. Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.
>
> § 1303. Responsibilities and liabilities of carrier and ship—Seaworthiness.

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

CARGO

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

CONTENTS OF BILL

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

* * *

(c) The apparent order and condition of the goods; *Provided*, That no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he had no reasonable means of checking.

BILL AS PRIMA FACIE EVIDENCE

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods

as therein described in accordance with paragraphs (3) (a), (b), and (c) of this section: ***.

* * *

§ 1304. Rights and immunities of carrier and ship—Unseaworthiness.

* * *

UNCONTROLLABLE CAUSES OF LOSS

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(n) Insufficiency of packing;

* * *

AMOUNT OF LIABILITY; VALUATION OF CARGO

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed; *Provided*, That such maximum shall not be less than the figure above named. In no

event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

Thus, where plaintiff has established its *prima facie* case by proving that the shipment was received by the defendant in good order and condition as evidenced by the master's clean on board bill of lading and delivery in a damaged condition at destination as evidenced by the cargo survey report and testimony thereto, the carrier has the burden of proving that the damage to the shipment was not due to their negligence or that it was occasioned by one of the "excepted" causes of COGSA, 46 U.S.C. § 1304(2). *Nichimen Co.* v. *MV Farland* (2d Cir. 1972), 426 F.2d 319; *American Tobacco Co.* v. *The Katingo Hadjipatera* (2d Cir. 1951), 194 F.2d 449, cert. den. (1952) 343 U.S. 978.

POINT I

There was no evidence that the shipper knowingly and fraudulently mis-described the shipment.

The Court below found that the shipper knowingly mis-described the goods shipped and was of the opinion, therefore, that the carrier was relieved of any liability for damage to the shipment under the terms of COGSA, Title 46, U.S.C. § 1304(5) (Opinion No. 40153; 9a, 10a, 11a). This finding of mis-description was predicated upon the bill of lading's contents, which described the shipment as 283 bundles of wire rods while the invoice described the merchandise as coils (Opinion; 10a). However, there was no

direct evidence offered to show who prepared the bill of lading in question although the carrier's printed form was used (Plaintiff's Exhibit 2) and, under Section 1303(a), (b) and (c) of COGSA, it is the carrier's obligation to issue to the shipper a bill of lading covering the goods shipped. The absence of proof showing that it was the shipper who mis-described the cargo, and that the shipper did so knowingly, constituted a failure on the part of the defendant to carry its burden of proving that the damage was not due to its negligence or that it was occasioned by one of the "excepted" causes in Title 46, U.S.C. § 1304. *Nichimen Co.* v. *McFarland* (2d Cir. 1972) 426 F.2d 319.

With regard to the application, by the Court, of the exonerating provisions of the third paragraph of 46 U.S.C. § 1304(5) to its finding that the shipper knowingly misstated the nature and value of the shipment, it is respectfully submitted that more than a bare finding of a knowledgeable misstatement by the shipper is required. That paragraph provides:

> "Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

By the plain import of its language, this section of the statute requires a finding by the Court of both knowledge and fraud on the part of the shipper for its application. It is submitted that the Court did not find fraud because it could not since the nature of the shipment was clear and unmistakable by its very appearance (124a, 125a), thus affording the carrier reasonable means of checking same. The requirements of the words of a statute are not to be read out of it by judicial interpretation. *United States v.*

Felt & Tarrant Manufacturing Company (1931), 283 U.S. 269, 273, 75 L.ed. 1025.

Clearly, therefore, the Court below erred in finding that the defendant proved that the shipper knowingly misstated the nature and value of the shipment and that the damage therefor fell within the "excepted" causes in 46 U.S.C. § 1304. The Court also erred in finding that where a shipper knowingly misstates the nature and value of the shipment and no more, that damage to such shipment falls within the "excepted" causes in 46 U.S.C. § 1304.

POINT II

The damage to the shipment occurred as a result of the fault of Irish Shipping Ltd., its management, employees and others acting for it.

The plaintiff established its prima facie case by proving that the shipment was received by the defendant in good order and condition, as evidenced by the master's clean on board bill of lading (Plaintiff's Exhibit 2) and delivery in a damaged condition at destination by the survey report of Mr. M. J. Juric (Plaintiff's Exhibit 5; 149a), and his testimony thereto (44a thru 70a). *Nichimen Co.* v. *MV Farland* (2d Cir. 1972) 426 F.2d 319; *American Tobacco Co.* v. *The Katingo Hadjipatera* (2d Cir. 1951), 194 F.2d 449, cert. den. (1952) 343 U.S. 978. At no time was there any evidence introduced at the trial which proved or even tended to prove that the damage sustained was occasioned to the shipment at any time other than when it was in the care, custody, and control of the defendant, its management, employees or others acting in their behalf. In fact, the "hatch survey" (Plaintiff's Exhibit 6; 151a) from carrier's files, disclosed that the shipment had been excepted to as damaged while it was still aboard the vessel and noted that the coils were improperly stowed and that

packaging was generally satisfactory. It, therefore, became incumbent upon the defendant to prove that the damage was not the result of its negligence or that it was occasioned by an "excepted" cause under COGSA, 46 U.S.C. § 1304. *Nichimen Co.* v. *MV Farland, supra.*

POINT III

Defendant has failed to prove that the damage did not result from its negligence or that it was occasioned by an "excepted" cause under COGSA.

Under COGSA, plaintiff established a *prima facie* case by proving receipt of the cargo by the ship in good order and delivery at destination in a damage condition. *Mamiye Bros.* v. *Barber Steamship Lines, Inc.* (SDNY 1965) 241 F.Supp. 99, aff'd. (2d Cir. 1966) 360 F.2d 774, cert. den. (1966) 385 U.S. 835, 17 L.ed. 2d 70; *Nichimen Co.* v. *MV Farland* (2d Cir. 1972), 426 F.2d 319.

Under sections 1303(1) and (2) of COGSA, the carrier is bound to exercise due diligence to make the ship seaworthy, to make the ship safe for the reception, carriage and preservation of the cargo, and to properly load, handle, stow and discharge the goods being shipped. *Demsey & Associates* v. *SS Sea Star* (2d Cir. 1972) 461 F.2d 1009, 1014. Once a *prima facie* case has been established, the burden of proof is on the defendants to establish that the damage was not due to their negligence, or that it was occasioned by one of the "excepted" causes in Section 1304(2) of COGSA. *Mamiye Bros.* v. *Barber Steamship Lines, Inc., supra; Nichimen Co.* v. *MV Farland, supra.*

In an attempt to carry that burden, the defendant offered the testimony of Mr. Mark C. Lindstrom, Claims Manager and Safety Director for Transoceanic Terminal Corporation (85a thru 111a). Mr. Lindstrom testified

that his employment with Transoceanic commenced August 1st, 1967, over two (2) months after the subject shipment had been off-loaded from the ship and placed inside Transoceanic's warehouse (85a, 86a). He said that he recalled that he had viewed the subject shipment without studying it before August 1st, 1967 (89a), but that he subsequently noticed the nature of the bands which held the individual coils (89a, 90a). His testimony was that he recalled that the individual coils were banded with narrow steel bands which he said were of a maximum of half-an-inch in width, and, in his opinion, insufficiently narrow (90a). However, Mr. Lindstrom also testified that the damaged coils had been completely recoopered, according to his employer's records, by June 22nd, 1967 (98a). Therefore, when Mr. Lindstrom studied the coils in question, he viewed them, as he admitted, in their recoopered and rebanded state and not as they were originally delivered to the carrier by the shipper (98a, 108a, 109a, 110a). Under cross examination he said that he did not see the cargo discharged from the vessel nor did he see it moved from the pier to the shed (107a). His opinion as to the sufficiency of the packaging employed was, therefore, addressed to that which was the product of recoopering and rebanding efforts ordered by his employer.

To bolster Mr. Lindstrom's testimony, the defendant called as a witness, Mr. Peter Siebel, Jr. (112a thru 131a). Mr. Siebel had the opportunity to listen to the prior testimony of Mr. Lindstrom during the trial and viewed, with a magnifying glass of unspecified power (115a, 116a) those photographs attached to Plaintiff's Exhibit 5, and those photographs which were marked Defendant's Exhibit D. From this, Mr. Siebel concluded that the banding was insufficient (117a). His opinion was grounded on what he saw in those photos attached to Mr. Juric's survey report,

Plaintiff's Exhibit 5, which showed what appeared to him to be a bailing wire or seizing wire used to bind the coils together with very few evidence in all these of actual strapping (116a). Mr. Juric's photographs of the damaged coils, however, were taken on June 14th, 1967 (46a, 47a) at the time of his survey, and after a substantial amount of recoopering and rebanding of the coils had been completed.

Most significant of Mr. Siebel's testimony was his opinion that under normal conditions the shipment, even in the state that he considered it as having been packed, could have been handled properly (123a, 124a). All that was lacking, in his judgment, was proper equipment (124a). But there was no testimony whatsoever that proper equipment was unavailable.

Plaintiff's cargo surveyor, Mr. Melvin J. Juric, testified (44a thru 70a) that he physically examined the damaged coils several weeks after they were discharged from the vessel and while they were still in the custody of the carrier. His written survey report was admitted into evidence (Plaintiff's Exhibit 5; 149a; 51a) and which attests to the fact that, in his opinion, the packaging was sufficient. Mr. Juric testified that he recalled having seen bands that were split (67a) and that, in his opinion, rough handling could cause the bands to split (68a).

Nor was Mr. Juric alone in his opinion that the packaging of the coils was adequate for shipping. The "hatch" survey report (Plaintiff's Exhibit 6, 151a), which was admitted into evidence (75a) was performed at carriers' request and taken from carriers' files. That report indicates that although the surveyor found evidence of damage to the shipment here in question while it was on board the vessel, he did not find fault with its packaging. He did find fault

with its stowage. In fact, with regard to all cargo aboard, he noted as follows:

"Our inspection of cargo in the holds disclosed:

A) Stowage: Good except some disturbed cartons in #4. T/D and some coils in D/T in slanting positions.

B) Packing: Generally satisfactory."

Logically, carriers' surveyor having found damage to the coils, would have attributed it to insufficiency of packag- if he so considered the coils insufficiently packaged instead of the improper stowage which he noted. This evidence must, therefore, be considered as an admission against carriers' interest. *United States* v. *Lykes Bros. Steamship* Co. (5th Cir. 1970) 432 F.2d 1076; *Compagnie De Navigation, Etc.* v. *Mondial United Corp.* (5th Cir. 1963) 316 F.2d 163, n. 10 171.

Clearly, the defendant did not offer any direct evidence on the issue of insufficiency of packaging and the record is devoid of any proof to support the finding of the Court below that the cargo was insufficiently packaged for shipping (11a). The defendant did not prove how the coils were packaged for shipment but rather attempted to show how the coils appeared to have been packaged after they were recoopered and rebanded by the defendant's agent. Plaintiff, however, proved by uncontradicted direct evidence that the packing employed on the coils was sufficient, by the opinion of the only witness produced at the trial who physically examined the coils in their damaged and rehabilitated state. Testimony was also offered to show that damage could have been avoided if the coils were handled properly. Furthermore, carrier's hatch survey (Plaintiff's Exhibit 6; 15a), noted not only improper stowage of

the coils aboard the vessel but also noted that damage to the coils was found while the coils were still aboard the vessel although their packing was generally satisfactory.

It is respectfully submitted that the lower Court's finding on the issue of packaging was clearly erroneous in that it is not supported by the evidence at hand. *McAllister* v. *United States* (1954) 348 U.S. 19, 99 L.ed. 20.

CONCLUSION

The decision of the Court below dismissing plaintiff's complaint and granting judgment for the defendants against the plaintiff should be reversed, and judgment should be granted to the plaintiff against the defendants in the sum of $8,222.34 plus interest and costs.

Respectfully submitted,

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